

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2556

PETITION OF SUE K. AND PHILIP E. WHEATON

OPINION OF THE BOARD
(Hearing Date: March 12, 2003)
(Effective Date of Opinion: May 14, 2003)

Case No. S-2556 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Montgomery County Zoning Ordinance to permit an accessory apartment.

The Board of Appeals held a hearing pursuant to Section 59-A-4.11(a) of the Zoning Ordinance. Sue Wheaton and Philip Wheaton appeared and testified. Housing Code Field Supervisor Robert Dejter of the Montgomery County Department of Housing and Community Affairs (DHCA) also testified.

Decision of the Board: Special exception granted, subject
to conditions enumerated below.

EVIDENCE PRESENTED TO THE BOARD

1. Sue K. and Philip E. Wheaton, owners of the subject property, seek permission under Section 59-G-2.00 to create and operate an accessory apartment on their property. The subject property is Lot 10, Block 7, Lipscomp and Earnest Trustees' Addition to Takoma Park Subdivision, located at 7211 Spruce Avenue, Takoma Park, Maryland 20912, in the R-60 Zone. The subject property is located in the Takoma Park Historic District and is considered a contributing resource in the district [Exhibit Nos. 3, 5, 10 and 17].
2. The accessory apartment is proposed to be located in the basement of the house. [Exhibit Nos. 3(a), 6, 10(a)].
3. The Wheatons live in the main part of the house. [Exhibit No. 17].

4. The lot comprises 10,371 square feet. [Exhibit No. 3(a)].
5. The house was built in 1923 and the Wheatons have owned the property for 29 years. [Exhibit No. 10(a)].
6. The applicants propose no exterior modifications to the house itself, but do propose to move the outside walkway about two feet farther away from the house. [Exhibit No. 10(a)].
7. The accessory apartment has the same address as the house and has a separate entrance at the side of the house. [Exhibit Nos. 10(a) and 17].
8. There is one off-street parking space available. [Exhibit No. 3(a)]. The applicants submitted photographs [Exhibit No. 15 a-e] showing on-street parking available during the day. The applicants state that they own only one car, and that, because their house is located within walking distance of a metro station, they only intend to rent the apartment to someone who does not own a car.
9. Maryland National Capital Park and Planning Commission (MNCPPC) staff recommends approval of the special exception, with conditions. Staff finds that the application is consistent with the land use goals of the Takoma Park Master Plan. Staff finds that there is one off-street parking space, and recommends approval of the special exception based upon a condition that there can be no more than two cars parked at the subject site, one in the driveway, and one on the street. Staff states that there is one other approved special exception in the immediate area, approved in 1963 [SE-80], for a private educational institution for not more than five piano students at any one time. Finally staff states that there are no other accessory apartments in the general neighborhood, and that the site is served by adequate public facilities. [Exhibit No. 17].
10. The square footage of the proposed accessory apartment would be 372 square feet, and the apartment would contain a combined living room/bedroom, a semi-enclosed kitchen, a fully enclosed bathroom and two closets. [Exhibit Nos. 3(a), 6]. Pursuant to the provisions of the Montgomery County Housing Code, the apartment would be suitable for occupancy by no more than three related, or two unrelated persons.
11. Montgomery County Housing Code Field Supervisor Robert Dejter conducted a preliminary inspection of the subject property. A report of his inspection, dated February 3, 2003, is entered into the record as Exhibit No. 14 and states: "All required building, electrical and plumbing permits must be obtained and finalized before the unit may be occupied.
12. The applicants understand that they can receive compensation for only one dwelling unit.

General Conditions

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian, traffic, and parking activity; and the potential for additional noise from that additional household. The Board finds that none of the physical or operational characteristics of the proposed accessory apartment exceed what would be expected to be associated with this use, and that there will therefore be no non-inherent adverse effects of this proposed accessory apartment.

59-G-1.21. General Conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

An accessory apartment is permitted by special exception in the R-60 Zone.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a

presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

As discussed below, the accessory apartment as proposed will comply with the standards set forth in Section 59-G-2.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

MNCPPC technical staff found that the proposed accessory apartment is consistent with the Takoma Park Master Plan's support for diverse housing choices.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

No new structures are proposed. At 372 square feet, the accessory apartment will house no more than three people. There are no other accessory apartments in the immediate neighborhood, and only one other special exception: for five piano students at any one time, two or three blocks away on Willow Avenue. The Board concurs with technical staff's finding that a combination of one on-site parking space and a limitation of two cars associated with the subject property will mitigate any adverse impact of parking associated with the use. The accessory apartment has a separate entrance at the side of the house, which maintains its single family residential appearance.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that the activity associated with one to three possible occupants of the proposed apartment will be minimal and will have little effect and no detrimental impact on surrounding properties.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

No activity or changes to the property are proposed which would have any of the listed effects. The Board adopts technical staff's proposed condition of approval that lighting along the side yard walkway must be designed to limit intrusion onto the adjacent property.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.*

There are no other accessory apartments in the neighboring one-family residential area. The Board finds that this accessory apartment in conjunction with the approved special exception for a private educational institution for piano lessons on Willow Avenue will not affect the area adversely or alter the predominantly residential character of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

No proposed or expected operational or physical characteristics of the use will have any of the listed adverse effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*

The subject property is served by public facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

N/A

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be,*

must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

N/A

- (b) *Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other authorization or approval required by law, nor does the Board's finding of facts regarding public facilities bind any other governmental agency or department responsible for making a determination relevant to the authorization, approval or licensing of the project.*

The applicants have stated that they will with all requirements for permits and licensing in connection with their application.

- (c) *The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

The Board finds that the applicants have met these requirements.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one apartment is proposed.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

The accessory apartment would be located in the basement of the house and therefore shares at least one party wall in common with the main dwelling.

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

N/A

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

N/A

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

The dwelling, built in 1923, is 80 years old.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

The accessory apartment is proposed to be located in the basement of the single family house occupied solely by the applicants. No other residential uses exist on the subject property.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

The accessory apartment would have a separate entrance at the side of the house.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

No external modifications to the house are proposed. Applicants state that they may move an exterior walkway two feet further from the house.

- (8) The accessory apartment must have the same street address (house number) as the main dwelling.*

The proposed apartment, located in the basement of the house, would have the same address.

- (9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

The proposed apartment would consist of 372 square feet. Occupying a portion of the basement, the apartment would be subordinate to the main dwelling.

(b) Ownership requirements:

- (1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

The applicants live in the main part of the house.

- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

The applicants have owned the subject property for 29 years.

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

The applicants state that they understand this requirement, and will receive compensation for only one dwelling unit.

- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

Petitioners are the owners of the subject property, as evidenced by the deed submitted with the application.

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

N/A

(c) Land use requirements:

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

The lot size is 10,371 square feet.

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

There are no other accessory apartments in the neighboring one-family residential area. The Board finds that this accessory apartment in conjunction with the approved special exception for a private educational institution for piano lessons on Willow Avenue will not affect the area adversely or alter the predominantly residential character of the area.

- (3) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The site is served by public water and sewer.

- (4) Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

The applicants propose to park one car in their driveway. They have submitted photographs showing the availability of street parking [Exhibit No. 15], and also state that they intend to rent the apartment to someone who does not own a car. Technical staff recommends a condition of approval that not more than two cars can be associated with the subject property, one to park on site, and one on the street. The Board finds that with that condition, there will be adequate parking for the requested special exception.

(5) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.

The Board finds that the physical and operational characteristics of the proposed accessory apartment will have little impact on surrounding properties or the general neighborhood: the apartment will have a separate entrance, preserving the single family appearance of the house; as conditioned above, parking in connection with the apartment is adequate, and the activity or noise expected to be associated with the one to three possible occupants of the apartment will not adversely affect neighboring properties.

Therefore, based upon the foregoing, the Board grants the requested special exception subject to the following conditions:

1. Petitioners shall be bound by their testimony and exhibits of record, to the extent that such evidence and representations are identified in Board's opinion.
2. The number of cars permitted to park at the site is limited to two: one on site, and one on the street.
3. Lighting for the side yard walkway shall be designed so as to limit intrusion onto the adjacent property.
4. Any new construction or exterior alteration plans must be submitted to the Historic Preservation Commission for review prior to receiving a building permit.
5. Pursuant to the provisions of the Montgomery County Housing Code and based upon its square footage, the proposed accessory apartment will house no more than three related persons or two unrelated persons.

On a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Louise L. Mayer and Donna L. Barron, Vice Chairman in agreement, and Donald H. Spence, Jr., Chairman necessarily absent, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donna L. Barron
Vice-Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 14th day of May, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

